In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1172.

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
AND
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
AND
COALITION FOR TAX REFORM, INC., AND UNITED PEOPLES, INC.,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss or Affirm.

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In accordance with the provisions of Rule 16 of the Supreme Court of the United States, the Attorney General

of Massachusetts (Appellee)[1] moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Issues Presented and Statute Involved.

The issues presented are adequately expressed in the Amici Curiae Brief in Support of Jurisdiction and the statute involved is reproduced in the Jurisdictional Statement (pp. 3-4).

Statement.

This is a direct appeal from a final judgment of the highest court of the Commonwealth, holding that the provisions of Massachusetts General Laws (G.L.) c. 55, § 8, are constitutional both on their face and as applied to the plaintiffs in the case below.

The Appellants are five business corporations who wished to make contributions or expenditures to oppose a proposed amendment to the Massachusetts Constitution. If passed at the November 2, 1976, general election, the amendment would have authorized the imposition of a graduated state personal income tax. Appellants brought an action in the Single Justice session of the Supreme Judicial Court in April

[1]The Attorney General of the Commonwealth was the only named defendant in the original action. Two groups were subsequently permitted to intervene as parties defendant (App. 3, n. 5), but neither is represented by the Attorney General through this submission.

of 1976, seeking a declaration that G.L. c. 55, § 8, as amended by Mass. St. 1975, c. 151, § 1, unconstitutionally deprived them of their right to contribute or expend monies for that purpose. The case was submitted on Agreed Statements of Fact (App. 31-48) and reported without decision to the full bench of that court.

The case was heard on June 8, 1976, and on September 22 the court ruled (1) that business corporations enjoy a constitutional right to contribute or expend money to support or oppose ballot questions only when their business, property or assets are materially affected by the questions; (2) that in G.L. c. 55, § 8, the Massachusetts Legislature has clearly identified the parameters of corporate free speech, permitting, by the express terms of the statute's first sentence, corporate speech wherever it is constitutionally required; and (3) that the Appellants failed to demonstrate that they were materially affected by the graduated personal income tax amendment and that they were therefore not entitled to a declaration that the statute was unconstitutional as applied to them.[2]

On November 2, 1976, the voters of the Commonwealth rejected the graduated income tax amendment (App. 4). None of the Appellants made statutorily proscribed contributions or expenditures in opposition to the question and, thus, none currently faces prosecution under G.L. c. 55, § 8.

[2]The Appellee submits that the correctness of this holding is not properly presented by appeal under 28 U.S.C. § 1257(2). The basis for that holding was Appellants' failure to sustain the burden of proof on a petition for declaratory judgment under G.L. c. 231A (App. 14-15). This failure to satisfy a statutory burden of proof constitutes an independent and adequate non-federal ground for the holding, but is not itself broad enough to sustain the entire judgment of the state court. *Eustis* v. *Bolles*, 150 U.S. 361, 370 (1893).

Argument.

I. The Case Is Not "Capable Of Repetition, Yet Evading Review."

Both the Appellants and the Amici suggest that this case has not become moot on appeal. They argue that it falls within that narrow class of cases presenting important legal issues which should be decided even after the underlying dispute has terminated, because they are "capable of repetition, yet evading review." *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498, 515 (1911). This exception to the doctrine of mootness is inapplicable, because (a) the challenged statute does not operate in too short a time frame for complete litigation, and (b) the issues are otherwise capable of review.

Although the Appellants did not bring this action until April of 1976, their cause of action existed at least as early as May 7 of the preceding year. On that date the Massachusetts General Court took the final legislative action necessary to place the graduated income tax amendment on the ballot. I Journal of the Senate 1409-12 (1975). At that time the 1975 amendment to G.L. c. 55, § 8, was also fully effective.[3] As the Supreme Judicial Court noted, the Appellants had control over the commencement of this litigation and could have sought declaratory relief in the spring of 1975, nearly eighteen months prior to the election (App. 15, n. 15). Thus, the limited period for review in this case may be seen as a direct consequence of the Appellants' trial strategy, rather than as a natural result of the election laws of the Commonwealth. *Compare*, *Roe* v. *Wade*, 410 U.S. 113 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

[3]St. 1975, c. 151, became effective on April 28, 1975.

Little is added to the mootness analysis by characterizing this as an election case. Concededly, the "capable of repetition, yet evading review" exception has been invoked in the past to sustain jurisdiction after the relevant election has passed. *American Party* v. *White*, 415 U.S. 767 (1974); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Dunn* v. *Blumstein*, *supra*; *Moore* v. *Ogilvie*, 394 U.S. 814 (1969). But this Court has not erected a unique rule for election matters and has also frequently sustained mootness claims in such cases. *E.g.*, *Brockington* v. *Rhodes*, 396 U.S. 41 (1969); *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

Furthermore, this is not a typical election case presenting questions about the constitutionality of nominating procedures or voter qualifications. This appeal implicates the constitutionality of a criminal statute. Its validity may therefore be reviewed not only on appeal from a civil case but also on appeal from a conviction. Clearly, such an appeal would not be mooted by passage of an election, and the issues presented by this case are, therefore, not likely to evade review, if they recur.

II. The Case Does Not Present A Substantial Federal Question.

Essentially[4] the Appellants base their appeal on the assertion that corporations enjoy First Amendment rights coextensive with those of natural persons or associations of

[4]The Appellants further argue that the challenged statute is vague, overbroad, and denies them equal protection of the law. Appellee chooses not to brief these issues and respectfully refers the Court to the discussion of these issues in the opinion of the Supreme Judicial Court (App. 15-23).

natural persons. The Appellee submits, and the Supreme Judicial Court held, that business corporations differ from natural persons and do not enjoy freedom of speech *per se*. Instead, a corporation's business and property interests are entitled to the protection of the Fourteenth Amendment, an incident of which is the possession of certain rights of speech and expression. "Thus . . . only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public" (App. 13).

It is undisputed that a corporation is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2, of the Constitution and the Fourteenth Amendment. *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 210-211 (1945). It is equally clear that a corporation is "a 'person' within the meaning of the equal protection and due process of law clauses" of the Fourteenth Amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244 (1936). The question presented, then, is the extent of the protection those clauses afford corporate political expression.

Whenever corporations have successfully claimed First Amendment protection through the Fourteenth Amendment, a business or property, interest of the corporation has been directly involved.[5] This is true even in the recent cases cited by the Appellants, which invalidated state statutes restricting corporate expenditures or contributions relating to ballot questions. In *Pacific Gas and Electric Co.* v. *City*

[5] *E.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Grosjean* v. *American Press Co.*, *supra*.

of Berkeley, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976), a local ordinance prohibiting corporate political contributions was held to violate the First Amendment as applied to the plaintiff electric company, which was desirous of opposing a ballot question. The question would have authorized the city to acquire, by condemnation if necessary, plaintiff's facilities within the city. The court found: "The 'Acquisition Ordinance,' on which P G & E [Pacific Gas and Electric] sought to express its views, was not merely a matter of general interest to P G & E, but was expressly intended to result in the taking over of P G & E's facilities within the City of Berkeley." 131 Cal. Rptr. at 353. Obviously, such acquisition would have materially affected the business of Pacific Gas and Electric.

The United States District Court for the District of Montana held last year that a state statute placing an absolute bar on corporate political contributions was unconstitutional. *C & C Plywood Corp.* v. *Hanson*, 420 F. Supp. 1254 (1976). The action was brought by sixteen corporations and one bank who wanted to oppose an initiative amendment to further regulate nuclear facilities. The court noted:

> ". . . it appears that the only parties plaintiff with standing to sue in this case are: Montana Associated Utilities, Inc.; Montana-Dakota Utilities Co.; Montana Power Company; and, Pacific Power and Light.
>
> "I believe the action could be dismissed as to the other plaintiffs on the ground that they lack standing. The Nuclear Initiative primarily involves power, and it is the power companies that want to 'pay or contribute' on this matter." *Id.* at 1260.

The court did not rule that corporations do or do not have an absolute First Amendment free speech right, and appears instead to have ruled simply that those corporations with a material business interest in power must be permitted to protect that interest.

Neither Appellants, the Attorney General nor the court below have been able to find support for the proposition that a corporation's right to free speech is coextensive with that of natural persons. On the contrary, it seems clear that "a corporation does not have the same First Amendment rights to free speech as those of a natural person, but, whether its rights are designated 'liberty' rights or 'property' rights [footnote omitted] a corporation's property and business interests are entitled to Fourteenth Amendment protection. *Pierce* v. *Society of Sisters of Holy Names*, 268 U.S. 510 (1925)" (App. 12).

When a corporation has a direct, financial interest in the publication of views or the expression of ideas, a due process claim concededly attaches to any attempted governmental interference. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). Nor does communication lose its protection because money is expended for its publication and dissemination. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). When liberties protected by the Fourteenth Amendment are combined with corporate business or property interests, then the Constitution holds forth protection through the due process clause. As stated by this Court in *Pierce* v. *Society of Sisters of Holy Names, supra*:

> "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. . . . But they have business and property for which they claim protection." (Citations omitted.) 268 U.S. at 535.

The Appellants in the case at bar failed to demonstrate that they were materially affected by the proposed graduated income tax amendment (App. 14-16). Accordingly, they may not successfully claim Fourteenth Amendment protection.

Appellants argue that not only are they entitled to speak, but that the public is entitled to hear their view. Nowhere in the record of this case is it indicated that the public has been deprived of the corporate position. Indeed, many individuals shared this perspective and were free to contribute and expend money in furtherance of their views. Thus, the limitations imposed on corporations by G.L. c. 55, § 8, "in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." *Buckley* v. *Valeo*, 424 U.S. 1, 29 (1976). Rather, those limitations serve the Commonwealth's legitimate interests in maintaining the integrity of elections and protecting minority shareholders from the political, as opposed to financial, judgment of the majority. Moreover, they do so without intruding on the constitutional prerogative of corporations to protect their business interests. Thus, the Supreme Judicial Court was clearly correct in ruling G.L. c. 55, § 8, valid and enforceable.

Conclusion.

Wherefore, Appellee respectfully submits that the questions upon which this case depends are so insubstantial as not to need further argument, and moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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